SHARIKAT PEMBORONG PERTANIAN & PERUMAHAN v. FEDERAL LAND DEVELOPMENT AUTHORITY

[O.C.J. (Raja Azlan Shah J.) June 24, 1971]

[Kuala Lumpur — Originating Motion No. 24 of 1969]

Arbitration — When court can interfere — When court can review award — Error apparent on face of award.

Contract — Agreement — Breach — Arbitration award — When court can review award.

This was an application to set aside an award made by the arbitrator on the ground that the award, when compared with the issues raised in the plaintiffs' points of claim and the respondents' points of defence was bad on the face of it in that the arbitrator was guilty of misconduct, had erred in point of law, gave wrongful inferences of fact and finally that the award was uncertain.

The plaintiffs had contracted to execute and complete the developments of the defendants' land at Sungei Berang in accordance with the specifications, conditions, *etc.* attached to the contract. The plaintiffs commenced work in April 1966 but abandoned it in March 1967 before completion. The defendants gave notice calling upon the plaintiffs to continue the work and the plaintiffs failing to comply with it, the defendants duly terminated the contract. The matter went to arbitration and the plaintiffs claimed damages. They specified 5 items which they alleged the defendants had committed breaches of contract entitling them to abandon the contract before completion. The defendants denied the claim and all the allegations.

Held: dismissing the motion: (1) in this case, no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally and necessarily arose in applying ascertained facts. The reference involved both composite questions of law and fact. The court could therefore review the award if there was error apparent on the face of the award;

(2) the award in this case was sufficiently certain when read in conjunction with the issues raised in the statement of claim and defence. The motion therefore must be dismissed.

Per Raja Azlan Shah J.: "It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. ... In the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one."

Cases referred to:-

(1) *Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.* [1933] A.C. 592.

(2) *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Railways of London Ltd.* [1912] A.C. 673.

(3) *Hodgkinson* v. *Fernie* 3 C.B. (N.S.) 189; 140 E.R. 712.

(4) *Attorney-General for Manitoba* v. *Kelly & Ors.* [1922] 1 A.C. 268, 281 P.C.

(5) *Government of Kelantan* v. *Duff Development Co. Ltd.* [1923] A.C. 395, 411.

(6) *In re King & Duveen* [1913] 2 K.B. 32.

(7) *In re Great Western Railway Co. & H.M.'s Postmaster-General* (1903) 19 T.L.R. 636.

(8) *Worsdell* v. *Holden* 1 L.T. 14.

(9) *Tripp* v. *Armitage* 150 E.R. 1957.

(10) *Mortin* v. *Burge* 111 E.R. 1049.

MOTION

D. P. Vijendran for the plaintiffs.

S. T. Chung for the defendants.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is a motion to set aside an award of the arbitrator dated 27th June, 1969 on the ground that the award, when compared with the issues raised in the plaintiffs' points of claim and the respondents' points of defence is bad on the face of it in that the arbitrator was guilty of misconduct, had erred in point of law, gave wrongful inferences of fact and finally that the award was uncertain.

The plaintiffs contracted with the defendants to execute and complete the development of the defendants' land at Sungei Berang, in the State of Perak, in accordance with the specifications, conditions, etc attached to the contract. The scheme was known as the Sungei Berang Land Development Scheme Phase III and it covered an area of approximately 1,530 acres of jungle land. The work included felling, burning, stacking and reburning, terracing, holding, sowing of cover crops, planting seed-at-stake, maintenance of cultivated areas for 6 months afterwards and construction of jeep tracks. It was a condition of the contract that the work was to be carried out in accordance with the directions and to the reasonable satisfaction of the superintending officer (D.W.3). The plaintiffs commenced work in April 1966 but abandoned it before completion. That was in March 1967. The defendants issued a notice calling upon the plaintiffs to continue work in default they would issue a notice determining the contract. The plaintiffs did not comply with such notice and the defendants duly terminated the contract. The matter went to arbitration before Mr. Khoo Eng Chin, an advocate and solicitor of the High Court. The plaintiffs claimed a sum of $155,949.68 and general damages. Before the arbitrator they specified 5 items which they alleged the defendants had committed breaches of contract entitling them to abandon the contract before completion, namely:

"(1) that the defendants' manager or the superintending officer had persistently and wantonly under-estimated the works done by them and consequently under-paid them in respect of progress payments, (2) that the defendants' manager or the superintending officer had instigated and caused their workers to go on strike on two occasions, (3) that the defendants' manager or the superintending officer had compelled them to purchase rubber seeds at exorbitant prices, (4) that the defendants' manager or the superintending officer had constantly harrassed and subjected them to all sorts of pressures, (5) that the defendants had wrongly imposed fines on them under the contract."

The defendants denied the claim and all the allegations made against them and/or their agents and/or their servants. They contended that the plaintiffs had without reasonable cause wholly suspended and abandoned the contract before completion.

The key question before the arbitrator was whether the plaintiffs were justified in abandoning the contract before completion. In order to decide this question the arbitrator had to consider from the evidence before him whether the 5 specific allegations enumerated above had been proved. Those were findings of fact. From those findings of fact a question of law became material. The present case bears

no resemblance to the case where a specific question of law is referred to the arbitrator.

It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd.* v. *Great Western (London) Garden Village Society Ltd.*,[1] *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Railways Co. of London Ltd.*[2] *Hodgkinson* v. *Fernie*,[3] and *Attorney-General for Manitoba* v. *Kelly and others*.[4] *Government of Kelantan* v. *Duff Development Co. Ltd*,[5] and *In re King and Duveen*[6] are instances of the latter.

In the present case I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. The court can therefore review the award if and when there is error apparent on the face of the award.

In my view the plaintiffs' case can be consolidated under four heads, *viz.*, error of law, misconduct, bias and uncertainty of the award.

Error of Law:

The error of law on which it is sought to set aside the award can be summed up, more or less, into these points: (1) The arbitrator drew wrong inferences of fact from the evidence, (2) the arbitrator erred in assuming that the plaintiffs were estopped from challenging the validity, sufficiency or otherwise of the progress payment certificates after they had been signed by the plaintiffs and (3) the arbitrator had erroneously construed the plaintiff's letter dated January 18, 1967.

Let me state here that this is not a re-hearing. My sole purpose is to determine whether there is error of law on the face of the award. With regard to the first point, I am not satisfied that the arbitrator had drawn wrong inferences of fact from the evidence. Even if he did, that by itself is not sufficient as a ground to warrant setting aside the award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been "misapprehended and misunderstood" (see *In re Great Western Railway Co. And H.M.'s Postmaster-General*[7]). The allegation that the arbitrator held that the plaintiffs were estopped from challenging the validity *etc.* of the progress payment certificates is based on a false premise. I find nowhere in the award that the arbitrator had stated his finding on such lines. With reference to the third objection, the plaintiffs argued that the correct interpretation of their letter was "that the works not mentioned in their letter had been fully completed," but the arbitrator interpreted it "that the works mentioned therein had not yet started and that it did not mean that the works not mentioned therein had been fully completed." The said letter was strongly relied upon by the plaintiffs to substantiate their allegation that the superintending officer had not given sufficient and adequate attention with regard to the measurement of works done. In my opinion the question is one of construction and of applying it. As long as it is capable of a meaning it will ultimately bear that meaning which the arbitrator decides is its proper construction, and the arbitrator will decide its application. Assuming the arbitrator had erred in interpretation, that in my opinion was only a mistake on his part. That *per se* is not sufficient as a ground to set aside the award. *Worsdell* v. *Holden*[8] is authority for the well-established principle that misconstruction of letters of an arbitrator as amounting to a mistake is not a ground for revoking the award. Parties who submit their cases to arbitration know fully well that arbitrators are fallible; they consent to take them with all their faults. In my judgment, in the context in which the letter was written, the arbitrator was correct in arriving at his conclusion after comparing the visiting manager's reports dated January 11 and 28, 1967.

I am satisfied that the award contains no error of law on its face.

Misconduct:

Putting it broadly, the second major complaint is that the arbitrator was guilty of misconduct, namely, he had ignored and/or failed to consider a major portion of the evidence adduced before him and the several questions of law and fact which were raised. In the law of arbitration misconduct is used in its technical sense as denoting irregularity and not moral turpitude. It includes failure to perform the essential duties which are cast on an arbitrator as such, for instance, failure to observe the rules of natural justice, appearance of bias or partiality. It also includes any irregularity of action which is not consonant with the general principles of equity and good conscience. These illustrations are not meant to be exhaustive. But failure to analyse and appraise the evidence does not vitiate the award on the ground of misconduct. It is only when the evidence is material, relevant and had gone to affect the award that the award will be vitiated. In my judgment the plaintiffs' complaint is sustainable only if the failure to do so had occasioned some irregularity causing a miscarriage of justice that is apparent on the face of the award. The arbitrator in the present case had carefully analysed and appraised the material and relevant evidence as he saw fit and came to a conclusion of law. He concluded by saying that

"I find *on the evidence* that the plaintiffs were not justified in abandoning the contract, as they did in or about the middle of March 1967, before the completion of the contract."

When he used the phrase "I find on the evidence" it must be taken as axiomatic that he had taken into

account all material and relevant evidence and the determination of points of law and fact to suit the particular case in hand. It would be an intolerable burden on any arbitrator if he were to mention all and every piece of evidence and questions of law and fact in his award. He is not required to do that. He need only refer to material and relevant evidence to suit the key question to the dispute. I conclude that there was no misconduct on the part of the arbitrator.

Bias of Certifier:

Submission was directed to the lack of impartiality and independence of the certifier (D.W. 3) in issuing the progress payment certificates. It is said that the certifier as required by the contract agreement must exercise his own skill and judgment but in the present case he had failed to do that and was improperly influenced by the defendants through the agency of the visiting manager. If this argument is substantiated then there can be no doubt that the certifier was disqualified from issuing the certificates so as to deprive them of their effects.

Clause 1(a) read with clause 31(a) of the contract agreement is to the effect that the defendants were to execute the work to the reasonable satisfaction of the superintending officer who was the authority to issue the progress payment certificates. I have examined the contract agreement, in particular document "A" and I found that the superintending officer was not defined. I therefore perused the evidence and I found the following testimony: P.W. 1: Walter John Putra, the managing partner of the plaintiffs —

"Progress payments were made on recommendation of manager at site. On two occasions, visiting manager authorised further progress payments after inspection. Certificate of progress payments require counter-signature of visiting manager".

D.W. 1: M. S. Sayed Mohamed, the visiting manager of the defendants —

"All certificates would have to be signed by three persons, the scheme manager, the contractor and the visiting manager ... Manager of scheme cannot issue a certificate of payment on his own. A certificate is normally issued after a visit by the visiting manager. If a visiting manager visits the scheme, he checks the amount of work done at the scheme. He normally instructs scheme manager on the amount to pay for works done. When a visiting manager visits the scheme he must submit his report to manager of scheme, copy of report is forwarded to head office. Normally, the report contains the general agricultural condition of the area, the progress of work done since his last visit, inspection of the areas previously inspected and instructions on what to recommend for payment to contractor. If he is not satisfied with works at the scheme, he would instruct scheme manager on what steps or action to be taken... Paul Raj was the superintending officer at the scheme. He was the only one... manager at the scheme is bound to follow recommendations and report of visiting manager. ... visiting manager is the immediate superior to scheme manager. Most of the instructions of scheme manager come from visiting manager but not all instructions."

D.W. 3: Wilson Paul Raj: —

"Those were letters written by me to the plaintiff company. Contents of those letters were instructions from visiting manager. ... Contractor does certain piece of work. He then requests for inspection of work. The visiting manager comes to inspect. The visiting manager puts up a report and recommends what payment is to be made to contractor. I am bound by recommendations of visiting manager. I have to pay amount recommended by visiting manager."

In my view the parties had contemplated that the superintending officer should act on the recommendation of the visiting manager with regard to the issue of progress certificates. That is clear from the evidence. If that was the arrangement between the parties the plaintiff cannot now resile from it. They have only themselves to blame for having agreed to that arrangement. It cannot be said that here there was an improper interference by the employers.

Assuming there was breach of an implied term of the contract requiring the certifier to act on his own skill and judgment, was the breach so fundamental as to affect the substance and foundation of the contract? I cannot say that it has that effect. If the certifier was not qualified to issue the certificate, so that they were deprived of their full effect then whatever amount of money was paid and received by the plaintiffs would be accounted for and adjusted when the work was finally completed. It must be mentioned here that the progress certificate is not final but merely a qualified approval. (See *Tripp* v. *Armitage*[9]).

Uncertainty of Award:

It is now said that the award is uncertain in that it had not decided matters referred to it. *Mortin* v. *Burge*[10] was cited in support. In that case the arbitrator had failed to state for what sum the verdict was to be entered. In the present case the key question before the arbitrator was whether the plaintiffs were justified, or, as counsel on behalf of the plaintiffs put it, whether the plaintiffs had reasonable cause to suspend work. To determine that question the arbitrator had to consider the plaintiffs' allegations separately. He considered them and arrived at the following conclusion:

"I find, (on the evidence) that the plaintiffs were not justified in abandoning the contract, as they did in or about the middle of March, 1967, before the completion of the contract. I accordingly dismiss the plaintiffs' claim with costs."

I am at a loss to say that the award had not decided the question referred to it. I am satisfied that the award is sufficiently certain when read in conjunction with the issues raised in the statement of claim and defence.

I would dismiss the motion with costs.

Motion dismissed.

Solicitors: *Athi Nahappan & Co.; Chung & Huang.*